Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-923

INSURANCE COMPANY OF NORTH AMERICA,

Petitioner,

v.

INDEX FUND, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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Opinions Below

The opinion of the Court of Appeals (Pet. App. A1 - A16) is reported at 580 F. 2d 1158. The opinion of the District Court (Pet. App. A17 - A28) is not reported.

Question Presented

Is the bond which respondent was required to procure under Section 17(g) of the Investment Company Act of 1940 (15 U.S.C. 80a-17(g), the "Act") a statutory bond which Congress intended cover losses arising from the kind of dishonest and fraudulent activity in which respondent's president engaged ?

Statement

Respondent is a registered investment company and procured a fidelity bond from petitioner pursuant to the requirements of Section 17(g) of the Act and Rule 17g-1 promulgated by the Securities and Exchange Commission (the "Commission") under the Act.

Respondent sued on the bond to recover losses resulting from the dishonest and fraudulent activity of its former president, Robert R. Hagopian. At the trial in the District Court respondent proved that Hagopian had engaged in a scheme whereby he caused respondent to purchase securities at artificially inflated prices. Respondent also proved that Hagopian was convicted on charges of conspiracy and embezzlement under Section 37 of the Act. (Pet. App. A18).

The Court of Appeals reversed the judgment n.o.v. entered by the District Court ruling that the bond in suit was a "statutory bond" which the Congress intended cover the kind of dishonest and fraudulent activity engaged in by Hagopian.

The Court of Appeals therefore awarded judgment to the respondent. (Pet. App. at A9, 580 F. 2d at 1163).

The Commission has concurred. Investment Company Act Release No. 10393, September 8, 1978.

Argument

1. The Court of Appeals correctly found that the bond is a "statutory bond" which is to be read in conjunction "..with the language of the statute and the purpose for which the bond is given. American Casualty Co. of Reading, Penn. v. Irwin, 426 F. 2d 647 (5th Cir. 1970)" (Pet. App. at A8, 580 F. 2d at 1162).

Thus, it follows, that petitioner's argument that there was a choice of coverages available to respondent is illusory because the statute permits of no such choices. For like reason, the additional argument that the Court of Appeals ignored the intentions of the parties to the insurance contract is irrelevant, as the only concern in this case must be with the coverage of a bond required by an Act of Congress.

2. Rule 19 of the Revised Rules of the Court states the considerations governing review on certiorari. The instant petition fails to disclose any special or important reason for granting the writ.

A. There is no conflict with the decision of another court of appeals.

The Ninth Circuit appeal to which

petitioner refers, Research Equity Fund v. The Insurance Company of North America, C-74-1174, has not yet been decided by the Ninth Circuit Court of Appeals. Furthermore the case in the Ninth Circuit is quite distinguishable. Among the more important differences is the lack of a criminal conviction for conspiracy and embezzlement by the dishonest investment advisor. More importantly, perhaps, is the finding that such person was not an employee covered by the bond sued upon.

B. There has not been a decision of an important state question in conflict with applicable state law.

The New York cases cited by petitioner (Kean v. Maryland Casualty, 248 N.Y. 534 (1928) and Condon v. National Surety Corp., 16 N.Y. 2d 775 (1965) did not deal with the coverage to be afforded by a statutory bond; rather, they were concerned with the meaning of the word "trading". In both cases, the losses sued upon arose from securities transactions with customers of brokerage houses. The brokers argued that the trading loss exclusion in the bonds was not intended to apply to brokerage transactions. The distinction sought to be made between "dealer" transactions and "broker" transactions was not recognized in the lower New York courts. In affirming, the New York Court of Appeals rendered no opinions.

3. The decision of the Court of Appeals for the Second Circuit is consistent with the objectives of the Congress that enacted the legislation, which were "...to mitigate and, in so far as feasible

to eliminate conditions described as not in the best interests of the security holders of investment companies" Hearings on S. 3580 before a Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess. at 37, see also 264-5 (1940). cf. American Power & Light Co. v. Securities and Exchange Commission, 329 U.S. 90 at 105, 113 (1946).

The decision of the Court of Appeals is also consistent with prior decisions with which this Court appears to have agreed on similar questions arising under the federal securities laws. Securities and Exchange Commission v. Talley Industies, Inc., 399 F. 2d 396 (2d Cir. 1968) cert. denied 393 U. S. 1015(1969); U.S. v. Deutsch, 451 F. 2d 98 (2d Cir. 1971) cert. denied 404 U.S. 1019 (1972); U.S. v. Blitz, 533 F. 2d 1329 (2d Cir. 1976) cert. denied 429 U.S. 819 (1976).

Conclusion

The petition for a writ of certiorari should be denied.

Dated: New York, New York
January 24, 1979

Respectfully submitted,

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